SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-618

HARRISON PROPERTY MANAGEMENT CO., INC., WALTER J. HARRISON, WILLIAM H. HARRISON AND MRS. LYDIA HARRISON COUTURIE RYAN,

Petitioners

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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I N D E X

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TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully pray that the Court reconsider its Order denying their petition for a writ of certiorari to review the judgment of the United States Court of Claims in the above entitled cause, entered by this Court on January 7, 1974, and grant the petition.

As grounds for this petition,

petitioners respectfully request the Court's consideration of the following:

I. The decision of the United States Court of Claims violates the due process clause of the Fifth Amendment to the Constitution of the United States:

As was stated in Nichols v. Coolidge, 274 U.S. 531, 542 (1927):

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th Amendment." (Citations Omitted).

If a statute can be declared in violation of the Fifth Amendment, certainly the confiscatory application of taxing statutes in this case offends the due process clause of the Fifth Amendment to the Constitution of the United States.

The decision of the United States Court of Claims likewise violates the rulings of this Court in Hoeper v. Tax Commission, 284 U.S. 206, 215, 218 (1931), wherein the Court said:

> "That which is not in fact the taxpayer's income cannot be made such by calling it income."
>
> * * * * *
>
> "The exaction is arbitrary and is a denial of due process."

The income belonging to the individual petitioners herein, reported by them on their individual income tax returns, and

subjected to income tax at individual rates cannot be made the income of the corporation by calling it corporate income. Subjecting the individual income to corporate income tax under these circumstances is arbitrary and a denial of due process.

II. The decision of the United States Court of Claims is in conflict with decisions of the Courts of Appeals for the Fifth Circuit, the District of Columbia Circuit, the Eighth Circuit and the Fourth Circuit:

A. In the case of McInerney v. Commissioner of Internal Revenue, 82 F.2d 665 (5th Cir. 1936), a corporation was created for the purpose of passing title to the purchaser of property and passing payment to the petitioner. The Court held that payment to the corporation was constructively received by the petitioner.

However, in this case the United States Court of Claims has held that receipts of a corporation created to receive income belonging to its owners is taxable to the corporation.

B. The Court in 112 West 59th Street Corporation v. Helvering, 68 F.2d 397, 398 (D. C. Cir. Ct. 1933), stated:

> ". . . the entire beneficial interest in the property was in the trust . . . petitioner was a mere 'conduit' and . . . it never at any time had any legal right to retain the profits from the transaction in question. . .

> then it would seem to follow that the liability to pay the tax under the federal income tax laws was solely a liability of the trust and not a liability of petitioner. And this is particularly true when we consider that the former duly reported and paid the tax and no question of bad faith in the organization of petitioner or in its participation in the transaction is or can be attributed to it."

Here too, the corporation never at any time had any legal right to retain the profits which the United States Court of Claims has taxed to it; nor is there any question of bad faith in the organization of the corporation or tax avoidance motives. (Pet. 39).

Moreover, in the 112 West 59th Street Corporation case, the Court went on to say:

> "It may well be that at the time of the transaction there was no specific or formal agreement that petitioner should hold the property for the benefit of the trust, but the absence of such agreement or the lack of formality does not alter the obvious intent of the arrangement. No court would in the circumstances we have named permit it to retain the property or the profits in fraud of the real owner."

In the instant case, a carefully drawn

agreement established the rights of the owners to the income from the property and no court would permit the corporation to retain the property or the profits in fraud of the real owners. Despite this principle of law, the United States Court of Claims has required the corporation to pay income tax on revenues it received for the benefit of others and which it had no legal right to retain!

C. The Eighth Circuit has said:

"A cardinal purpose of the income tax laws is to tax income to the person who has the right or beneficial interest therein, and not to throw the burden upon a mere conduit through whom or which the income passes." (Citations Omitted) Central Life Assur. Soc. Mut. v. Commissioner of Internal Revenue, 51 F.2d 939, 941 (8th Cir. 1931).

The Court concluded:

"The undisputed fact is that the petitioner bound itself to pay to designated persons 'any earnings there may be for a period of twenty-two years from the date hereof, from the non-participating business hereby and hereunder transferred,' and that a method of determining those earnings, which is apparently fair and sincere and workable, is set forth in the contract. . .These earnings never became the absolute property of petitioner, and it could lawfully do with them but

> one thing, which was to pay them over in accordance with the contract. It secured no beneficial interest whatsoever from them."

In the instant case, the earnings in question never became the property of the corporation, and it, too, could lawfully do but one thing with those earnings, that is, pay them over to the owners of the property in accordance with its contract with the said owners.

D. In the case of United States v. Brager Building & Land Corporation, 124 F.2d 349, 351, 352 (4th Cir. 1941), a corporation was organized to provide an agency to take property over from a partnership, and to hold title in order to avoid complications in case of the death of the surviving member of the partnership. The Court stated:

> ". . . it is going too far to say that if a taxpayer forms a corporation for his convenience, he is thereafter estopped from disclosing the true nature of the arrangement, whenever it is of advantage to the government to recognize only the corporate form. . . it has been held that when a corporation has been formed merely as an agency to hold title to real estate for the convenience of the owner, and has served this purpose with little or no independent activity on its part, the property and the income therefrom should be regarded as belonging to the stockholder." (Citations Omitted).

The Court then concluded as to the corporation:

> "It was a convenient agency chosen by the owners to hold the record title of their property, and nothing more. It performed no other function, it engaged in no other activity, and was at all times completely subject to the dominion and control of the Brager partnership. The income from the property was in our opinion income of the partnership."

The corporation in this case is likewise a convenient agency chosen by the owners to hold record title to their property. The income from the property should be treated as the income of the stockholders and not the income of the corporation.

III. The decision of the United States Court of Claims results in unjust and oppressive consequences contrary to the principle announced by this Court in Farmers Loan & T. Co. v. Minnesota, 280 U.S. 204 (1929), and is beyond its judicial power:

In the case of Buhl v. Kavanagh, 118 F.2d 315, 323 (6th Cir. 1941), it was held that a transaction may not be broken up into various elements to create a tax, and that where the taxpayer had no control over the income in question, to tax all of the income to her would be unjust. Here, too, taxing all of the revenues from property to the corporation that does not

have any right to the income is unjust and oppressive.

Moreover, the United States Court of Claims in its ruling has in effect legislated that under the Internal Revenue Code a corporation may not be an agent of its stockholders. The well recognized principle of corporate law is to the contrary:

> "A corporation may be an agent for its shareholders, and individuals may be both stockholders and contractors with the corporation as an agent." 2 Mertens Law of Federal Income Tax, §17.11 p. 65.

This amendment to the Internal Revenue Code by the United States Court of Claims is beyond judicial power, as well as unjust and oppressive. See, Heiner v. Donnan, 285 U.S. 312 (1931).

CONCLUSION

For the reasons set forth in the Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

(ORIGINAL SIGNED)
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CERTIFICATE OF COUNSEL

I, C. ELLIS HENICAN, counsel for the above named petitioners do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

(ORIGINAL SIGNED)
C. ELLIS HENICAN

C. ELLIS HENICAN

CERTIFICATE OF SERVICE

I, C. ELLIS HENICAN, attorney for petitioners in the foregoing petition for rehearing, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day I have served copies of the foregoing petition for rehearing on:

Hon. Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

and

Hon. Scott P. Crampton
Assistant Attorney General
Attention: Mr. Thomas Smidt, II
Department of Justice
Tax Division
Washington, D. C. 20530

by mailing copies thereof, Air Mail, postage prepaid, addressed to their respective offices, on this 30th day of January, 1974.

(ORIGINAL SIGNED)
C. ELLIS HENICAN

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